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September 21, 1990

Hon. Frank Stapleton, Clerk
Court of Appeal, State of California
Division Four
3580 Wilshire Blvd.
Los Angeles, California 90010

Re: Church of Scientology of California and Mary Sue Hubbard, Appellants v. Gerald Armstrong, Defendant; Bent Corydon, Appellee; Civ. No. B038975

Dear Mr. Stapleton:

I am writing to bring the Court's attention to two recent cases which have bearing on the issue raised in the above-captioned case, which is fully briefed and pending before the Court. Both cases were decided after the briefing in this case was completed.

Inasmuch as there apparently is no specific rule or operating procedure of the Court of Appeal specifying the manner by which counsel should bring new authority to the attention of the Court, I am doing so by means of this letter, analagous to the procedure specified for use in the federal courts of appeal by Rule 28(j) of the Federal Rules of Appellate Procedure.

In the case before the Court, Church of Scientology of California ("Church") and Mary Sue Hubbard appeal from an order of the Superior Court, Los Angeles County (Geernaert, J.) which vacated a prior order of Superior Court Judge Breckenridge sealing the file in the case between appellants and Gerald Armstrong pursuant to a settlement agreement. Judge

Geernaert vacated that order upon motion of third party Bent Corydon, who sought access to limited portions of the file for use in his own private litigation against the Church. Judge Geernaert ruled summarily that virtually any request for access must automatically be granted, and ordered that the file be opened not only to Corydon, as he had requested, but to the general public as well. Upon appellants' petition to this Court, a stay was entered insofar as the Superior Court order allowed the general public access to the court file. Pursuant to the terms of the stay, Corydon himself has already gained access to the file and can refer to it in his litigation with the Church.

A recent case from the Court of Appeal, Sixth Appellate District, strongly supports the position asserted here by Appellants' that Judge Geernaert's order was erroneous. In Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian, 218 Cal.App.3d 1058, 267 Cal.Rptr. 457 (1990), modified on other grounds, 219 Cal.App.3d 234f, 1990 Cal.App. Lexis 358 (1990), review den. 1990 Cal. Lexis 2305 (1990), the appellant sought to set aside a settlement judgment which had provided for a "warranty of silence," including the parties' agreement to keep the settlement private and one party's agreement to hand over copies of his deposition, arguing that it was an illegal agreement. The Court of Appeal affirmed a lower court decision that the settlement agreement was not illegal, and, indeed, found it not unusual. The appellate court noted that "[o]ur experience with litigation in the Silicon Valley is that such agreements are routine here . . ." and found no impropriety where the sealed records of the court "remain in the file and are presumptively available to the public on a proper showing of necessity." 267 Cal.Rptr. at 469 (emphasis added).

The Court of Appeal cited to Estate of Hearst, 67 Cal.App.3d 777, 136 Cal.Rptr. 821 (1977), and Mary R. v. B & R. Corp., 149 Cal.App.3d 308, 196 Cal.Rptr. 871 (1978) for this determination. Both parties in the instant appeal have argued that the Hearst and Mary R. cases support their respective positions. The interpretation of the Sixth District shows that appellants' position is the correct one; sealing of court records should be maintained except where the party seeking access can demonstrate a necessity for unsealing which outweighs the other interests.

In a related later proceeding, Chuidian v. Philippine National Bank, 734 F.Supp. 415 (C.D.Cal. 1990), the district court, making an independent ruling, upheld the legality of the same settlement agreement. The court noted that:

> [m]any lawsuits are settled for the sole purpose of avoiding the public disclosure of embarrassing or private information. Such is not illegal because [unlike cases where parties seek to supress witness testimony or information required by the government to be disclosed] it does not call for the suppression of evidence at a trial or proceeding, but rather is merely a motive behind settling the dispute. The instant case is such a situation.

734 F.Supp. at 422.

Appellants ask the Court to consider these cases in addition to the cases cited in the already-filed briefs in this case. I am enclosing an original and three copies of this letter, which I request that you circulate to members of the Division.

Sincerely yours,

Eric M. Lieberman
Counsel for Appellants

EML/me
cc: Paul Morantz, Esq.
Toby Plevin, Esq.
Michael L. Walton, Esq.
Hon. Bruce R. Geernaert